## INDEX


Page

**TABLE OF CONTENTS**

OPINION BELOW ____ 1

JURISDICTION ____ 2

QUESTIONS PRESENTED ____ 2

STATUTORY PROVISIONS INVOLVED ____ 3

STATEMENT OF THE CASE ____ 3

REASONS FOR GRANTING THE WRIT ____ 5

CONCLUSION ____ 9


**TABLE OF AUTHORITIES**


Cases:

*Harrison v. State*, 83 Ga. 129 (1889) ____ 8

*Mackey v. United States*, 401 U.S. 667 (1971) ____ 8

*Jack H. Smith v. S. Lamont Smith*, 5 Cir. 1971, ____ F.2d ____, [December 14, 1971, No. 71-1311] No. 71-1148, 1971 Term, pending U.S. Supreme Court No. 71-1311 ____ 2, 5

*Stovall v. Denno*, 388 U.S. 293 (1967) ____ 8

*Thornton v. State*, 226 Ga. 837 (1970) ____ 4, 5

STATUTES

Ga. Code § 38-122 (1933) ____ 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

E. B. CALDWELL, WARDEN,
GEORGIA STATE PRISON,

*Petitioner,*

v.

GARY THORNTON,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, E. B. Caldwell, Warden, Georgia State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on February 1, 1972.

## OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendices hereto as Appendix A. The

opinion of the District Court, reported at 323 F.Supp. 254, appears in the Appendices hereto as Appendix B.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 2, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the traditional, longstanding Georgia jury instructions regarding alibi, considered in the context of the instructions in their entirety, have the effect of shifting to the defendant the burden of persuasion on an essential element of the crime charged, thereby relieving the prosecution from proving every element of the offense beyond a reasonable doubt and impairing the presumption of innocence with resulting deprivation of due process of law.

2. Whether the initial decision on the constitutionality of the traditional, longstanding Georgia alibi charge should be applied retroactively to a convicted State prisoner who challenges such jury instructions for the first time in a federal collateral attack on the conviction.

3. Whether the decision of the Court of Appeals for the Fifth Circuit in *Jack H. Smith v. S. Lamont Smith*, 5 Cir. 1971, ____ F.2d ____, [December 14, 1971, No. 71-1311], now pending in this Court on petition for certiorari, No. 71-1148, 1971 Term, should apply to the instant case if the circuit court decision in *Smith* is upheld or if certiorari to review *Smith* is denied.

## STATUTORY PROVISIONS INVOLVED

Ga. Code § 38-122 (1933):

> 38-122 (1018 P.C.) Alibi as a defense.—Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence. (59 Ga. 142; 65 Ga. 756; 64 Ga. 344.)

## STATEMENT OF THE CASE

The Respondent, Gary Thornton, was indicted on September 23, 1969, along with two others, for the offense of robbery. He was tried before a jury on November 19 and 20, 1969, and having been found guilty of armed robbery, he was sentenced to life imprisonment.

At the trial, Thornton offered an alibi through one witness, a Mrs. Ann Davis, and by his own unsworn statement. Mrs. Davis and Thornton were merely "friends", although she admitted that Thornton was the father of her child. Mrs. Davis and Thornton had allegedly been out together the night of the robbery with the former's sister and brother-in-law.

The original trial court's charge to the jury included charges on the State's burden of proving guilt beyond a reasonable doubt, the accused's presumption of innocence, the object of the trial being the discovery of truth, the credibility of witnesses, alibi, and the accused's unsworn statement. The charge is set out in its entirety in Appendix C to this petition. On ten occasions, the trial court reiterated the principle that guilt must appear beyond a reasonable doubt in order for a conviction to occur. After the jury retired, the court asked whether

there were any exceptions to the charge, and the defendant had none.[1]

Thornton appealed his conviction to the Supreme Court of Georgia[2] and also filed a petition for habeas corpus against the Sheriff of Fulton County before he was transferred to the custody of the State Board of Corrections. A motion for new trial had been made and denied before the habeas-corpus petition was heard. Although the motion for new trial is not in the record to show the questions raised therein, Thornton's brief to the District Court on federal habeas-corpus stated that:

> "*Instead of* challenging the jury charge on a Motion for New Trial, the petitioner decided to file a writ of habeas corpus in the Superior Court." (Emphasis added.)

Thornton did not challenge the alibi charge in his original State petition for habeas corpus, but, instead, added it by amendment to his petition on the day set for the hearing. Present counsel, who also represented Thornton in the State habeas proceedings, there said he brought the State habeas corpus action at the same time as he appealed because he did not know how the appeal would turn out. The State court granted habeas corpus the same day it was heard. A notice of appeal was filed by the Sheriff the next day. It was on the day before the appeal was set for argument to the Supreme Court of Georgia, that the habeas hearing was held and granted. Consequently, the Supreme Court of Georgia delayed

---

[1]Thornton was represented at his trial by appointed counsel, William Barber, Esquire and Hugh Martin, Esquire. Of the latter, present counsel for Thornton said, at the hearing on State habeas corpus, that he "did a good job for Gary Thornton on the trial."

[2]*Thornton v. State*, 226 Ga. 837 (1970).

decision on appeal from conviction until after the September 16 hearing on the appeal from grant of habeas corpus. *Thornton v. State*, 226 Ga. 837, 839 (1970).

Subsequent to the Supreme Court of Georgia's decision on November 5, 1970, denying the appeal and reversing the order for habeas corpus, Thornton commenced the proceedings in the District Court by filing the petition for federal habeas corpus relief on November 25, 1970. On February 12, 1970, the District Court entered its order granting the petition for writ of habeas corpus. On the same day, judgment was entered in favor of Thornton and against the Respondent warden. The appeal to the court below followed.

## REASONS FOR GRANTING THE WRIT

The decision of the court below turned upon its decision in the case of *Smith v. Smith*, 5th Cir. No. 71-1311, rehearing denied February 1, 1972, certiorari applied for, U.S. Supreme Court No. 71-1148, docketed March 8. Reasons enumerated for granting the writ in the instant case are the same as those contained in the application filed with this Court in No. 71-1148. In the interests of economy and the obvious desirability of consolidating the numerous cases turning upon the same questions of law, the argument in support of the reasons for granting the writ in the previously docketed application for a writ of certiorari is hereby incorporated by reference. Copies of the application for certiorari in *Smith v. Smith* are attached to and accompany the service copies of this application.

I.

**THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH A DECISION FROM THE COURT OF APPEALS FOR THE FIRST CIRCUIT ON THE SAME CONTROLLING PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.**

II.

**THE DECISION OF THE COURT BELOW IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A SERIES OF CONTEMPORARY DECISIONS OF THE SUPREME COURT OF GEORGIA ON THE SAME PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.**

III.

**THE DECISION MISCONCEIVES, MISCONSTRUES AND MISAPPLIES A DECISION OF THIS COURT ON A VITALLY IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.**

IV.

**IN THE EVENT THE *SMITH* RULING IS UPHELD, IT SHOULD HAVE PROSPECTIVE EFFECT ONLY.**

There is yet a fourth reason for granting the writ in this case. It arises from the summary application of the decision in *Smith* to the case at hand, without limiting the holding in Smith to prospective use.

The district court found that Thornton was convicted on November 20, 1969. It was at that time that the charge here involved was given. The court relied on and

applied a decision of the same district court dated December 28, 1970. That decision, in turn, was based in part on previous decisions of that same district court entered December 17, 1969. The Fifth Circuit decision in *Smith, supra,* was announced on December 14, 1971. All of the underlying cases, then, were decided *subsequent* to Thornton's trial, and the giving of the charge complained of.

Even if the charge fails to meet constitutional muster, and it has been demonstrated and is urged that it does not so fail, the earlier decisions of the district court should not be applied retrospectively in this case.

Petitioner's position in this regard was stated in the Brief for the Appellant, filed in the Fifth Circuit in both the instant case and in the *Smith* case, and is firmly restated here:

> While it is presently impossible to state with accuracy the number of Georgia convictions which would stand to be affected and relitigated should the decision of the court below be upheld, experience to date would indicate that by the most conservative estimate the figure will run into the hundreds, perhaps even into the thousands. The requisite finality of criminal proceedings upon which effective crime deterrence and law enforcement are drastically dependent, have been dealt yet another staggering blow. More importantly, the atmosphere of non-finality with its attendant state-guilt will seriously undermine and impede the sociological plateau upon which correctional rehabilitation must necessarily commence—the recognition of the individual inmates that the conduct for which they are incarcerated is the result of their own, and not the State's wrong doing. And to what end? Are the noble ideas of the Constitution properly served by

judicial determinations that are at once both disruptive and piddling? The [Petitioner] submits that they are not, and adheres firmly to his belief that this Court will so agree.

> At best, the court below could complain of the Georgia charge on the ground that it was possibly confusing to the jury. (The confusion, if any did exist, would reasonably appear to have been more advantageous to the inmate than to the State, the most notable vice in that Georgia alibi charge being its tendency to overemphasize and overinstruct the jury on the alibi question . . . ) In no event could reasonable men really suppose that the Georgia alibi charge affected the integrity of the fact-finding procedure so as to call for retroactive application. In light of the disastrous effects of the court below's conclusion, the decision of the court below applying retroactively its conclusion as to the Georgia alibi charge should be reversed.

It is submitted that an application of the principles involving retroactivity, as developed in *Stovall v. Denno*, 388 U.S. 293 (1967), warrants the non-applicability of the previous lower court decisions to the instant case. See also *Mackey v. United States*, 401 U.S. 667 (1971). Since the extent of the reliance by law enforcement authorities on the old standard has been continuous in Georgia since the last century, *Harrison v. State*, 83 Ga. 129 (1889), and the effect on the administration of justice of a retroactive application of the new standards if adopted, would create a potentially unhandleable burden of retrial on the State, with resultant release of prisoners without retrial, the objection to the charge as given, if valid, should be given only prospective application.

The third criteria for considering this question is the purpose to be served by a new standard. It would appear

that the purpose to be served by removing the objected-to portion from the charge on alibi would simply omit language which Respondent feels may have shifted the burden in the jury's minds. The suppositious nature of this contention shows that the purpose to be served by removing the language only cures a conjectural defect. It is only *assumed* that the jury is misled or confused by the objected-to portion of the charge. Not being a clear-cut or concrete deprivation of a constitutional protection, the ruling if upheld should for this reason also, be given only prospective application.

## CONCLUSION

The issues involved in this case and the companion case of *Smith v. Smith*, No. 71-1148, have become a most troublesome and disruptive problem in the administration of criminal justice. The issue remains open as one of substantial importance in the administration of the criminal law. It is respectfully requested that this Court

grant the writ of certiorari for the purpose of reviewing and reversing the decision of the Court of Appeals.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

P. O. Address:

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

DAVID L. G. KING, JR.
Assistant Attorney General

## CERTIFICATE OF SERVICE

This is to certify that I, counsel of record for Petitioner herein and a member of the Bar of the Supreme Court of the United States, have this day served true and correct copies of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit together with a copy of the Petition for a Writ of Certiorari in the case of *Smith, Warden v. Smith*, U.S., No. 71-1148, by mail, by depositing the same in a United States mail box, with first class postage prepaid, addressed to each of the following, who constitute all counsel of record:

Stanley H. Nylen, Esquire
Counsel for the Respondent
375 Pharr Road, N.E.
Atlanta, Georgia 30303

This_____day of_____, 1972.

_____

COURTNEY WILDER STANTON

**APPENDIX A**

**IN THE**

# United States Court of Appeals

**FOR THE FIFTH CIRCUIT**

---

**No. 71-1603**

**Summary Calendar***

---

GARY ALLISTER THORNTON,

*Petitioner-Appellee,*

VERSUS

E. B. CALDWELL, Warden,
Georgia Diagnostic & Classification Center,

*Respondent-Appellant.*

---

**Appeal from the United States District Court**
**For the Northern District of Georgia**

---

**(January 4, 1972)**

---

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: The final order of the district court is AFFIRMED, *Jack H. Smith v. S. Lamont Smith,* 5 Cir. 1971, ____ F.2d ____, [December 14, 1971, No. 71-1311].

AFFIRMED.

---

*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

**ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC**

**(February 2, 1972)**

**Before GEWIN, GOLDBERG and DYER, Circuit Judges.**

**PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.**

## APPENDIX B

323 F.Supp. 254 (N.D. Ga. 1971)

GARY ALLISTER THORNTON,

*Petitioner,*

v.

LEROY STYNCHCOMBE,
Sheriff of Fulton County,

*Respondent.*

Civ. A. No. 14427.

United States District Court,
N. D. Georgia,
Atlanta Division.

Feb. 12, 1971.

### ORDER OF COURT

MOYE, District Judge.

Thornton has filed his petition for habeas corpus, in which he attacks the charge on alibi given in his trial as denying him his rights under the Fourteenth Amendment.

Thornton was convicted of armed robbery in the Fulton Superior Court on November 20, 1969, and is serving a life sentence imposed thereon. The alibi charge[1] he

[1] "The defendant sets up as a defense in this case what the law terms an alibi. The claims he was not present but was elsewhere when the alleged offense was committed, if any offense was committed. [sic] Alibi is a defense involving the impossibility of the defendant's presence at the scene of the alleged offense at the

attacks was given to the jury in this trial. It is his contention that this charge deprived him of the presumption of innocence.[2]

He filed an appeal from his conviction, and while that appeal was pending, filed a petition for habeas corpus. The Court granted relief in his habeas corpus, based on Parham v. State, 120 Ga. App. 723, 171 S.E.2d 911 (1969), and ordered a new trial. The direct appeal, Thornton v. State, 226 Ga. 837, 178 S.E.2d 193, was consolidated in the Supreme Court with the State's appeal from the grant of a new trial in the habeas corpus case, Stynchcombe v. Thornton, 226 Ga. 837, 178 S.E.2d 193. Both are reported at 226 Ga. 837, 178 S.E.2d 193 (1970).

The Georgia Supreme Court, with one judge dissenting, affirmed the conviction and reversed the habeas corpus case in a *per curiam* opinion, placing their reliance upon Chaffin v. State, 225 Ga. 602, 170 S.E.2d 426 (1969), and Young v. State, 225 Ga. 255, 167 S.E.2d 586 (1969). The *Young* and *Chaffin* cases affirmed convictions against attacks on the "alibi charge", based on

---

time of the alleged commission and the range of evidence or showing in respect to time and place must be sufficiently strong to exclude the possibility of his presence.

"The burden is on the accused to establish his alibi not beyond a reasonable doubt but to the reasonable satisfaction that the defendant was elsewhere when the alleged crime was committed, if one was committed, it would be your duty to acquit the defendant."—Transcript, 115.

[2]Although there is no "standard" alibi charge per se, it appears that the "approved" Georgia alibi charge places the burden upon defendant, although in varying words, to prove his alibi to the "reasonable satisfaction" of the jury. See, the Georgia cases cited in Smith v. Smith, C.A. No. 14304, *infra*. It is the placing of this burden upon a defendant, regardless of the words used, which is here under attack.

the charge as a whole, and held that the charge did not shift the burden to the defendant to prove alibi by a preponderance of the evidence. Thornton v. State, *supra*. The Supreme Court distinguished Johnson v. Bennett, 393 U.S. 253, 89 S.Ct. 436, 21 L.Ed.2d 415 (1968), and Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968), apparently on the distinction in the words "preponderance" and "reasonable satisfaction".

The State resists petitioner's efforts on three fronts. First, the State asserts that since defendant Thornton did not except to the charge at the time it was made, he cannot do so on appeal or in this Court on habeas corpus. Secondly, the State asserts that petitioner was given a full and fair hearing at his armed robbery trial, and that the alibi charge did not prejudice him. Finally, the State moves to dismiss the petition since it was not verified.

The Court first addresses itself to the verification. Petitioner has moved to amend the petition to include the verification. The Court is of the opinion that it is better to reach the merits of the complaint, rather than dismiss on a technical ground; and since no prejudice is shown by the State, the amendment is ALLOWED filed.

The first substantive ground of respondent's motion to dismiss is that by failing to object to the alibi charge at trial petitioner has waived his right to raise it now. Respondent asserts that there is no "state action" as required by the Fourteenth Amendment, since, if the charge caused petitioner's conviction, it was the result of his "own conduct, concurrence, or acquiescence." Petitioner, of course, raised the ground on his habeas corpus petition. Presumably the same point was raised on direct appeal, probably by motion for a new trial, since the

Supreme Court consolidated the cases and made no differentiation in its ruling between the habeas corpus case and the appeal as to the points raised. While the law cited by petitioner is weak, it does support the proposition that a challenge to the charge may be made on a motion for new trial, and the Court is convinced that this is the correct rule. *See*, Ga.Code Ann. § 70-301; Harris v. State, 190 Ga. 258, 9 S.E.2d 183 (1940); Nix v. State, 94 Ga.App. 141, 93 S.E.2d 783 (1956). The State offers no law to the contrary, and the Court is persuaded that this ground for the State's motion to dismiss is not well taken. *Accord*, Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1968).

This brings the Court to the merits of the case, to wit, deciding whether the Georgia alibi charge places a burden upon petitioner, as a criminal defendant, to prove his alibi, and is therefore unconstitutional as a violation of due process. We hold that it is.

This Court has previously considered the exact question presented today. In an order filed by Judge Edenfield on December 28, 1970, in Smith v. Smith, C.A. No. 14304, and Shoemake v. Whitlock, 321 F.Supp. 482 (N.D.Ga. 1970), this Court found that the Georgia alibi charge is unconstitutional. That decision, which is being appealed by the State, was not cited to the court. See particularly pp. 11-12 of the December 28, 1970 order.

Judge Edenfield considered the Georgia cases, *Parham*, *Chaffin* and *Young*, *supra*, as well as Johnson v. Bennett and Stump v. Bennett, *supra*. The Court in an exhaustive and thorough opinion, dealt with the Georgia history as well as the constitutional imperatives. We see no reason to retreat from our decision in Smith v. Smith, *supra*, and decline to do so.

Therefore, it is ordered and adjudged that the writ of habeas corpus is granted and petitioner is remanded to Fulton County for a new trial. If the State has failed to retry petitioner within four months of final determination of this case if appealed, or four months of the date of this order if not appealed, he may return to this Court for appropriate relief.

## APPENDIX C

[196]

IN THE FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT
ATLANTA, FULTON COUNTY, GEORGIA

| | |
|---|---|
| THE STATE OF GEORGIA<br>VERSUS<br>GARY ALISTER THORNTON | CASE NUMBER<br>99090<br>CHARGE:<br>ROBBERY |

Transcript of the charge of the Court to the Jury had upon the trial of the above entitled and numbered cause by the Honorable O. L. Long, Judge Emeritus, Atlanta Judicial Circuit, Presiding, and a Jury, on November 19, 1969.

APPEARANCES:

WILLIAM WELLER, Esquire
GERALD BURROWS, Esquire
Assistants District Attorney

*Counsel for the State*

HUGH MARTIN, Esquire
WILLIAM BARBER, Esquire
Attorneys at Law

*Counsel for the Defendant*

REPORTED BY:

I. B. BROWNLOW, JR.
Official Reporter
Atlanta Judicial Circuit

* * * * * *

[197]

## CHARGE OF COURT

Ladies and Gentlemen of the Jury, the Grand Jury of Fulton County returned an indictment against Gary Thornton, the defendant in this case, in which he is charged with the offense of robbery. To this indictment the defendant entered his plea of not guilty and the indictment on the one hand and the plea on the other form the issue which you, as jurors, have been empaneled to try.

This indictment charges this defendant in the following language: In the State of Georgia, County of Fulton, in the Superior Court of said County, the Grand Jurors selected, chosen and sworn for the County of Fulton, to-wit, naming them, in the name and behalf of the citizens of Georgia, charge and accuse Sammy Haynes, Gary Thornton, and Square Lewis Rouse with the offense of robbery, for that said accused in the County of Fulton and State of Georgia on the 30th day of August, 1969, did unlawfully with intent to commit theft take from the person of George Eldredge, the following property, to-wit: one thousand four hundred thirty-seven dollars and thirty-eight cents ($1,437.38) in money of the value of one thousand thirty-seven dollars and thirty-eight cents ($1,437.38) and the property of Davis House No. One, Inc., by intimidation and by use of a shotgun, the same being an offensive weapon; contrary to the laws of [198] said State, the good order, peace and dignity thereof.

Now this indictment will be out with you and available to you for your inspection. The defendant's plea of not guilty challenges and denies every material allegation in this indictment. I charge you, before the State is entitled

to a verdict of conviction of the defendant at your hands, the burden is upon the State of proving the defendant guilty as charged, beyond a reasonable doubt. The defendant enters upon the trial with the presumption of innocence in his favor and this presumption remains with him throughout the trial unless and until it is overcome by evidence sufficiently strong to satisfy you of his guilt to a reasonable and moral certainty and beyond a reasonable doubt.

You are the judges of the law in this case but you take the law as given you in charge by the Court and applying the law to the facts, as you find the facts to be, you return a verdict that speaks the truth of the case. The object of all trials, and the object of all legal investigations, is the discovery of the truth. You are the sole and exclusive judges of the facts in the case. You pass upon the weight, force and credit to be given to the evidence in the case and you alone determine the credibility of the [199] witnesses who have testified in this case. In passing upon the credibility of the witnesses you are authorized to consider all the facts and circumstances of the case, the witnesses' manner on the stand, their means and opportunity for knowing the matters about which they testify, their interest or want of interest in the case; their intelligence or lack of intelligence and the nature of the matters to which they testify, their bias or prejudice, if any, and also their personal credibility as the same may legitimately appear from the trial of the case.

And you may also consider the witnesses' relation to the case or to the parties in the case; all these things are proper subjects, that is proper subject matters for your consideration insofar as they may legitimately appear from the trial of the case.

It is for you to finally determine what credit is to be given a witness. If there are conflicts in testimony, it is your duty to reconcile those conflicts, if you can, so as not to impute perjury to any witness sworn, but if there are conflicts you cannot reconcile you should believe that witness or those witnesses you think most entitled to credit.

The defendant in this case has made a [200] statement. In all criminal trials in this State the defendant has the right to make to the Court and Jury such statement in his case as he may deem proper in his defense. It shall not be under oath and shall have such force only as the Jury sees fit to give it. You may believe it in preference to the sworn testimony in the case if you see proper to do so. You may believe it entirely as true. You may reject it entirely as untrue. You may believe it in part as true and reject it in part as untrue. The force, weight and credit to be given to the defendant's statement is a matter entirely for you to determine.

I charge you as to two types of evidence. Direct evidence is that which immediately points to the question at issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. To warrant a conviction on circumstantial evidence the proved facts must not only be consistent with the hypothesis of guilt but they must exclude every other reasonable hypothesis save that of the guilt of the accused. I charge you, however, that whether dependent on direct or circumstantial evidence, the true test in all criminal cases is not whether the conclusion to which the evidence [201] points may be false but whether or not the evidence is sufficiently strong to satisfy your minds and

consciences to a reasonable and moral certainty and beyond a reasonable doubt of the defendant's guilt. If the evidence is thus strong it would be your duty to convict the defendant. If the evidence is not thus strong it would be equally your duty to acquit the defendant.

The defendant sets up as a defense in this case what the law terms an alibi. The claims he was not present but was elsewhere when the alleged offense was committed, if any offense was committed. Alibi is a defense involving the impossibility of the defendant's presence at the scene of the alleged offense at the time of the alleged commission and the range of evidence or showing in respect to time and place must be sufficiently strong to exclude the possibility of his presence.

The burden is on the accused to establish his alibi not beyond a reasonable doubt but to the reasonable satisfaction that the defendant was elsewhere when the alleged crime was committed, if one was committed, it would be your duty to acquit the defendant.

I further charge you, if the showing as to alibi has not been sufficient to show, to your reasonable [202] satisfaction, that the defendant was elsewhere at the time of the alleged commission of the alleged offense, and any showing whatever of alibi is to be considered by you on the general case along with the rest of the testimony and the defendant's statement, and if a reasonable doubt be raised by the evidence as a whole including the showing as to alibi, the doubt should be given and must be given in favor of innocence and the defendant acquitted.

Now, ladies and gentlemen, in criminal cases the defendant is allowed, if he sees fit, to offer evidence as to his general good character, and when such evidence is offered

it is the duty of the Jury to take that testimony, along with all the other testimony, and the statement of the defendant into consideration in determining the guilt or innocence of the defendant.

Good character is a positive, substantive fact and may be sufficient to generate in the minds of the Jury a reasonable doubt as to the guilt of the defendant. It is the duty of the Jury to take any evidence of general good character along with all the other facts and circumstances of the case and if in so doing the Jury entertains a reasonable doubt as to the guilt of the defendant, it is your duty to acquit. Nevertheless, if you should believe [203] the defendant is guilty beyond a reasonable doubt it would be your duty to convict, notwithstanding evidence as to general good character.

Our law provides in Code Section 26-801 as follows: "Every person concerned in a commission of a crime is a party thereto and may be charged with and convicted of commission of the crime. A person is concerned in the commission of a crime only if he: (1) Directly commits the crime; or (2) intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; or (3) intentionally aids or abets in the commission of the crime; or (4) intentionally advises, encourages, hires, counsels, or procures another to commit the crime."

Our law provides further in Code Section 26-802, with reference to trial and conviction of one not directly committing a crime, as follows: "Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for the commission of the crime upon proof that the crime was committed and that he was

a party thereto." Participation in the commission of the same criminal act and in the execution of a common [204] criminal intent is necessary to render one person in a legal sense an accomplice of another. In felony charges, and this is a felony charge, a conviction is not authorized on the uncorroborated testimony of an accomplice, and until the testimony of an accomplice is corroborated by other competent evidence which you believe or by the facts and credible circumstances involved by the trial you would not be authorized to convict on such testimony.

I charge you further that the testimony of one accomplice, if satisfactory to the Jury, is sufficient corroboration of another accomplice in a felony case. If you should find from the evidence that a witness in this case was an accomplice, then before you would be authorized to convict the defendant on the testimony of such witness the corroborating facts and credible circumstances must be such as, independent of the testimony of the alleged accomplice, would lead to the inference of the defendant's guilt and the corroborating facts and circumstances must in some way directly connect the defendant with the criminal act charged, independently of the testimony of such accomplice. I charge you further however that the testimony of one accomplice, if satisfactory to the Jury, is sufficient corroboration of another accomplice in a felony case.

[205] Conspiracy consists of a corrupt agreement between two or more persons to do an unlawful act. This agreement may be established by direct proof or by circumstantial evidence or by proof of conduct which discloses a common design on the part of the defendants charged to act together for the accomplishment of the

unlawful purposes. It is for the Jury to determine from all the facts and circumstances whether or not there was a conspiracy to do the unlawful act alleged in the indictment, and if you find there was a conspiracy then you determine what was the scope of the conspiracy and who were the conspirators and whether or not the defendant was one of them.

If there was not a conspiracy the defendant could not be held responsible for anything except what you may find was done with him present, aiding and abetting therein or that which he did himself. If there was a conspiracy, and the defendant was one of the conspirators, and he counseled or procured or commanded the doing of the unlawful acts charged, he would be guilty as such under the law. Or if during the pendency of the conspiracy the defendant was aiding and abetting in the offense charged he would be guilty as a principal, if the offense was perpetrated as charged.

[206] In order to make out a conspiracy it is not necessary to prove there was an express agreement to do an unlawful act. If you are legally satisfied from the proof of acts and conduct submitted to you there was a conspiracy or common intent, proof of those acts and conduct would establish the existence of conspiracy as effectually as the same might be established by proof of an express agreement. The act of one does not bind another unless and until the common criminal intent to do what was unlawfully done in established beyond a reasonable doubt to have existed between the parties. If you find there was a conspiracy and the defendant was present and participated in the common intent and purpose to do the illegal act that was done, if any was done and what was done was that which is alleged in the indictment, then what

was done with another conspirator during the pendency of the conspiracy, after the defendant entered the conspiracy, if there was one, and the defendant entered it in pursuance of that common intent and purpose, would be just as binding on the defendant as if he had done the act himself. If you find there was no conspiracy or if there was one but it had ended, or if there was a continuing conspiracy and the defendant did not participate in the common intent and purpose to do what was done, or if you find that what was done is not that which is alleged [207] in this indictment, then anything done or said by any other person would not be binding on this defendant in this case.

The general rule is that when individuals associate themselves to do an unlawful act or acts, any act done in pursuance of that illegal enterprise by any one of these individuals, during the pendency of the criminal enterprise is in legal contemplation the act of all and binding upon all.

The charge against this defendant is armed robbery. Under the law, a person commits armed robbery when with the intent to commit theft he takes property of another from the person or the immediate presence of another by the use of an offensive weapon. You'll observe that in armed robbery there must be first, the unlawful and intentional taking of property from the person of another or the immediate presence of another. Second, this must be done with intent to commit theft. Third, the taking must be by the use of an offensive weapon, and fourth, it must be done without the consent of the owner or person in possession or control of the property taken.

Armed robbery, that is robbery by use of an offensive weapon, shall be punished by death or imprisonment for

life or by imprisonment for not less than one nor more than twenty years. Now, the State does not seek nor [208] does it ask for the death penalty in this case and you will not consider that. The Jury, may in its discretion impose either one of two punishments in the event you find the defendant guilty of armed robbery; that is, life imprisonment or a sentence of not less than one nor more than twenty years.

It is the contention of the State that at or about the time alleged in the indictment or within seven years prior to its return this defendant with the others named in this indictment did commit the offense of armed robbery by the unlawful and intentional taking of the property described in the indictment from the person, and the immediate presence of George Eldredge named in this indictment, that this was done with intent to commit a theft of the described property; that this was done by the use of an offensive weapon, and as I have said, with the intent to commit a theft and thereby deprive the owner, Davis House Number One, Inc., of the property described in this indictment.

If from a consideration of all the facts and circumstances as disclosed by the evidence you believe beyond a reasonable doubt and believe each and all these contentions of the State to be the truth of the case, you should [209] convict the defendant of the offense of armed robbery.

Should you convict the defendant of the offense of armed robbery that is, robbery by the use of an offensive weapon, it would become necessary for you to render your verdict in accordance with the form I am about to give. One form would be: "We, the Jury, find the defendant guilty of Armed Robbery." That verdict

would mean the Court would sentence this defendant to life imprisonment.

I charge you further that should you find the defendant guilty of armed robbery; that is, robbery by the use of an offensive weapon, you may in your discretion fix his punishment by imprisonment in the penitentiary for not less than one nor more than twenty years. In the event you find the defendant guilty of armed robbery and wish to fix the punishment at not less than one nor more than twenty years, the form of your verdict would be: "We, the Jury, find the defendant guilty of Armed Robbery and fix his punishment at blank number of years," filling in the number of years you determine to be proper. It shall not be less than one and not greater than twenty, and it may be any term of service between those two figures.

Now the defendant comes into Court and by his plea of not guilty and through his counsel has contended [210] he is not guilty of the offense charged and further contends the State has not proved his guilt of the offense as charged to a reasonable and moral certainty, and beyond reasonable doubt.

If from a consideration of the evidence or from a lack of evidence, or from the statement of the defendant alone, you believe these contentions of the defendant to be the truth of the case, or if you believe either of these contentions of the defendant to be the truth of the case or if there rests upon your minds a reasonable doubt as to his guilt it would be your duty to acquit him, and the form of that verdict would be: "We, the Jury, find the defendant not guilty." Whatever your verdict may be, Ladies and Gentlemen of the Jury, have your foreman

write it on the back of the indictment; have him or maybe have her sign it, date it, and return it into Court.

You may retire.

(Whereupon the Jury retired to the jury room)

* * * *

[211] THE COURT: Any exceptions to the charge.

MR. MARTIN: No, sir, Your Honor. No exceptions.

* * * *